

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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SANJIV N. DAVESHWAR,

Case No. 3:20-cv-00612-MMD-CLB

Petitioner,

ORDER

v.

GARRETT, *et al.*,

Respondents.

I. SUMMARY

This is *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by Nevada state prisoner Sanjiv N. Daveswar. Before the Court are Daveswar's motion for appointment of counsel (ECF No. 22-1) and motion to supplement Ground 3 (ECF No. 22), as well as Respondents' motion to dismiss the petition (ECF No. 13).¹ Daveswar voluntarily requested dismissal of his unexhausted claims. (ECF No. 21.) The Court will therefore grant Respondents' motion to dismiss, and will further grant Daveswar's motion to supplement Ground 3. However, the Court will deny Daveswar's fourth motion for appointment of counsel.

II. PROCEDURAL HISTORY AND BACKGROUND

Daveswar pleaded guilty to one count of attempted lewdness with a child under the age of fourteen years. (Exh. 14.)² The state district court sentenced Daveswar to a term of 48 to 180 months. (Exh. 20.) Judgment of conviction was filed on July 3, 2018. (Exh. 21.)

¹Daveswar responded to Respondents' motion to dismiss. (ECF No. 21.) Respondents did not file a reply. Respondents oppose Daveswar's motion to supplement Ground 3 (ECF No. 23) and his motion for appointment of counsel (ECF No. 24).

²Exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 13, and are found at ECF Nos. 11, 12, 15.

1 Daveswar filed a notice of appeal on September 26, 2018, which the Nevada
2 Supreme Court dismissed for lack of jurisdiction because the appeal was untimely. (Exhs.
3 23, 30.) The Nevada Supreme Court affirmed the denial of his state postconviction
4 petition in July 2020. (Exh. 54.)

5 Daveswar dispatched his federal habeas petition for filing on or about August 2,
6 2020. (ECF No. 7.)

7 **III. FOURTH MOTION FOR APPOINTMENT OF COUNSEL**

8 Daveswar has submitted his fourth motion for appointment of counsel. (ECF No.
9 22-1.) As the Court explained previously, there is no constitutional right to appointed
10 counsel for a federal habeas corpus proceeding. *See Pennsylvania v. Finley*, 481 U.S.
11 551, 555 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 428 (9th Cir.1993). The decision to
12 appoint counsel is generally discretionary. *See Chaney v. Lewis*, 801 F.2d 1191, 1196
13 (9th Cir.1986), *cert. denied*, 481 U.S. 1023 (1987); *Bashor v. Risley*, 730 F.2d 1228, 1234
14 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984). However, counsel must be appointed if the
15 complexities of the case are such that denial of counsel would amount to a denial of due
16 process, and where the petitioner is a person of such limited education as to be incapable
17 of fairly presenting his claims. *See Chaney*, 801 F.2d at 1196.

18 In his fourth motion for appointment of counsel, Daveswar states that it is difficult
19 to access legal resources and law library personnel lack knowledge to assist him.
20 However, the Court remains unpersuaded that counsel is warranted. The petition
21 presents his claims regarding his guilty plea in a reasonably clear manner, and the legal
22 issues do not appear to be particularly complex. Daveswar's motion is therefore denied.

23 **IV. MOTION TO DISMISS**

24 Respondents have filed a motion to dismiss parts of Grounds 2 and 4 in
25 Daveswar's petition as unexhausted. (ECF No. 13.) Daveswar concedes the claims
26 are unexhausted, and asked the Court to dismiss the unexhausted claims. (ECF No. 21.)

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A. Exhaustion

A federal court will not grant a state prisoner' petition for habeas relief until the prisoner has exhausted his available state remedies for all claims raised. See 28 U.S.C. § 2254(b); *Rose v. Lundy*, 455 U.S. 509 (1982). A petitioner must give the state courts a fair opportunity to act on each of his claims before he presents those claims in a federal habeas petition. See *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); see also *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the petitioner has given the highest available state court the opportunity to consider the claim through direct appeal or state collateral review proceedings. See *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981).

A claim is not exhausted unless the petitioner has presented to the state court the same operative facts and legal theory upon which his federal habeas claim is based. *Bland v. Cal. Dept. of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The exhaustion requirement is not met when the petitioner presents to the federal court facts or evidence which place the claim in a significantly different posture than it was in the state courts, or where different facts are presented at the federal level to support the same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v. Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982).

B. Ground 2

Daveshwar contends that his counsel was ineffective in violation of his Sixth and Fourteenth Amendment rights for (A) not disclosing discussions between the prosecution and the victim's father before advising Daveshwar to plead guilty; (B) not disclosing that the victim's father was unsure about the allegations before advising Daveshwar to plead guilty; and (C) not contacting character witnesses about whom Daveshwar inquired. (ECF No. 7 at 7-11.)

Respondents argue that Ground 2(B) is unexhausted. (ECF No. 13 at 5-6.) Specifically, Daveshwar claims that if counsel had spoken with the victim's father, he would have discovered that "this did not take place as described by the alleged victim."

(ECF No. 7 at 8.) Daveswar did not present this claim to the Nevada Supreme Court. (Exhs. 53, 54.) Ground 2(B) is therefore unexhausted.

Respondents also argue that Ground 2(C) is unexhausted. (ECF No. 13 at 6.) Daveswar did not present the claim that counsel failed to contact any character witnesses suggested by Daveswar to the highest state court. (Exhs. 53, 54.) Ground 2(C) is therefore also unexhausted.

C. Ground 4

Daveswar asserts that his counsel was ineffective for failing to move to withdraw his guilty plea before sentencing. (ECF No. 7 at 15-20.) Ground 4 includes five subclaims: (A) Daveswar's counsel failed to interview the victim, her father, and her friends; (B) counsel failed to disclose the discussion between the prosecution and the victim's father; (C) counsel wrongfully advised Daveswar that if he did not plead guilty, his prior convictions for sexually motivated coercion and commission of a sexual act in public could be used against him at trial; (D) Daveswar asked counsel to withdraw the plea before sentencing; and (E) counsel failed investigate text messages from the victim.

The Court finds Grounds 4(A), 4(B), and 4(E) are unexhausted. Respondents argue that Ground 4(A) is unexhausted because Daveswar did not raise the claim that his counsel was ineffective for failing to move to withdraw the guilty plea before sentencing because counsel did not investigate or interview the victim, her father, or her friends to the highest state court. (ECF No. 13 at 6.) Respondents argue that Ground 4(B)—that counsel was ineffective for failing to move to withdraw the guilty plea before sentencing because counsel did not disclose the discussion between the prosecution and the victim's father—is also unexhausted. (ECF No. 13 at 6.) Daveswar did not present this claim to the Nevada Supreme Court. (Exhs. 53, 54.) Finally, Respondents contend that Ground 4(E) is also unexhausted. (ECF No. 13 at 6.) Daveswar did not present the claim that counsel was ineffective for failing to move to withdraw the guilty plea before sentencing because counsel failed to investigate text messages from the victim to the Nevada Supreme Court. (Exhs. 53, 54.)

1 A federal court may not entertain a habeas petition unless the petitioner has
 2 exhausted available and adequate state court remedies with respect to all claims in the
 3 petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A “mixed” petition containing both
 4 exhausted and unexhausted claims is subject to dismissal. *Id.* In the instant case, the
 5 court finds that Grounds 2(A) and 2(C), and Grounds 4(A), 4(B), and 4(E) are
 6 unexhausted. Ordinarily, the Court would now direct petitioner to select one of three
 7 options:

- 8 • Submit a sworn declaration voluntarily abandoning the unexhausted claims in
 9 his federal habeas petition, and proceed only on the exhausted claims;
- 10 • Return to state court to exhaust his unexhausted claims in which case his
 11 federal habeas petition will be denied without prejudice; or
- 12 • File a motion asking this court to stay and abey his exhausted federal
 13 habeas claims while he returns to state court to exhaust his unexhausted
 14 claims.

15 Here, Daveswar did not oppose the motion to dismiss and instead filed what he styled
 16 a motion to dismiss the unexhausted claims and proceed on the exhausted claims. (ECF
 17 No. 21.) He has chosen the first option, and the Court will grant his motion. Daveswar’s
 18 unexhausted claims are dismissed, and Respondents will be directed to answer the
 19 remaining claims.

20 **V. MOTION TO SUPPLEMENT GROUND 3**

21 Five months after Respondents filed their motion to dismiss, Daveswar filed a
 22 motion to supplement Ground 3. (ECF No. 22.) In Ground 3, Daveswar asserts that his
 23 counsel was ineffective for advising him incorrectly regarding lifetime supervision and
 24 parole eligibility in violation of his Sixth and Fourteenth Amendment rights. (ECF No. 7 at
 25 12-15.) Daveswar states that he was denied parole on November 17, 2021. (ECF No.
 26 22 at 1.) Daveswar contends that his counsel told him that if he did not have any
 27 problems in prison and no write-ups that he would make parole. He blames his counsel’s
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1 “intentional misadvice” for the denial and states that his prolonged incarceration renders
2 his plea deal unintelligent and involuntary.

3 Respondents oppose the motion to supplement, arguing that Daveswar failed to
4 seek leave of the court to supplement his pleadings as required by Local Rule 7-2(g),
5 failed to show good cause to supplement, and failed to set forth the transaction,
6 occurrence, or event that happened that required that the pleading be supplemented, as
7 required by Rule 15(d) of the Federal Rules of Civil Procedure. (ECF No. 23 at 2.)

8 A federal habeas petition “may be amended or supplemented as provided in the
9 rules of procedure applicable to civil actions.” 28 U.S.C. § 2242. Federal Rule of Civil
10 Procedure 15(d) provides that “the court may, on just terms, permit a party to serve a
11 supplemental pleading setting out any transaction, occurrence, or event that happened
12 after the date of the pleading to be supplemented.”

13 The Court rejects Respondents’ arguments. While imperfect, Daveswar
14 essentially moved to supplement Ground 3 and he explains that the occurrence is the
15 denial of parole. The Court notes that the supplement does not fundamentally alter
16 Ground 3. Daveswar’s motion to supplement is therefore granted. The Court considers
17 ECF No. 22 as a supplement to Ground 3 of the Petition at ECF No. 7.

18 **VI. CONCLUSION**

19 It is therefore ordered that Respondents’ motion to dismiss (ECF No. 13)³ is
20 granted as follows. The Court finds that Grounds 2(A) and 2(C) and Grounds 4(A), 4(B),
21 and 4(E) are unexhausted. Grounds 2(A), 2(C), 4(A), 4(B), and 4(E) are therefore
22 dismissed.

23 The Clerk of Court is directed to detach and file Daveswar’s motion for
24 appointment of counsel (ECF No. 22-1). It is further ordered that Daveswar’s motion for
25 appoint of counsel is denied.

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28 ³Initially the Court referred to the motion to dismiss as located at ECF No. 21. (See
ECF No. 26.) However, ECF No. 21 is Petitioner’s response. This order, as corrected,
refers to the accurate location of the motion to dismiss at ECF No. 13.

1 It is further ordered that Daveswar's motion to supplement Ground 3 (ECF No.
2 22) is granted. The operative petition is comprised of both ECF Nos. 7 and 22.

3 It is further ordered that Daveswar's motion to respond to the opposition to
4 supplement Ground 3 (ECF No. 25) is granted.

5 It is further ordered that Respondents have 60 days from the date this order is
6 entered to file an answer to the petition.

7 It is further ordered that Daveswar has 45 days after the date Respondents' file
8 their answer within which to file his reply.

9 DATED THIS 2nd Day of March 2022.

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13 MIRANDA M. DU
14 CHIEF UNITED STATES DISTRICT JUDGE
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